No. 22,635

In the

United States Court of Appeals

For the Ninth Circuit

PETRA WILLIAMS,
Appellant,

vs.

FRANK J. KULIKOWSKI and MARIE ANN KULIKOWSKI, husband and wife,
Appellees.

Appellant's Reply Brief

SNELL & WILMER
MARK WILMER
400 Security Building
Phoenix, Arizona 85004
Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

MISCELLANEOUS

No. 22635

In the

United States Court of Appeals

For the Ninth Circuit

PETRA WILLIAMS,
Appellant,

vs.

FRANK J. KULIKOWSKI and MARIE ANN KULIKOWSKI, husband and wife,
Appellees.

Appellant's Reply Brief

PREFATORY ARGUMENT IN REPLY

This case, in its present posture, might well be referred to as "The Case of the Unsworn Witness." For that is the true issue here. Counsel for appellee overlooks, (or would ignore) the inescapable conclusion that the jury accepted his unsworn opinion as to the verdict value of each claimed item of damage and, in so doing, denied appellant a fair trial. Indeed, the reiteration of his opinion as a "servant of the jury" as to the valuation of each injury claim "bound by the rules of evidence, the ethics of the profession" as to what "is fair as a verdict" could well lead to the conclusion appellant was denied due process of law.

Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.ed. 682 laid down the rule:

> "A person's * * * right to his day in court (are) is basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him * * *"

See also:

Market St. Ry. Co. v. Railroad Commission, 324 U.S. 548, 65 S.Ct. 770

"Due process requires that commissions proceed upon matters in evidence and that parties have opportunity for cross examination and rebuttal."

State of Wisconsin v. Federal Power Commission, 201 F.2d 183 (C.A. D.C. 1952)

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S.Ct. 724, 81 L.ed. 1093

Public Utilities Commission v. Cole's Express, 138 A.2d 466 (Me.)

L. B. Wilson, Inc. v. Federal Communications Com'n, 170 F.2d 793 (C.A. D.C.)

Caesar's Restaurant v. Industrial Acc. Comm., 1 Cal. Rptr. 97, 175 C.A. 850

Philadelphia Co. v. Securities and Exchange Comm., 175 F.2d 804 (vacated on other grounds 327 U.S. 901)

Pennsylvania State Athletic Comm. v. Bratton, 112 A.2d 422 (1955)

Former Judge of the New Jersey Chancery Court and Member of Congress Marshall Van Winkle, in his entertaining "Sixty Famous Cases" Vol. I, excerpted the following from "The Ryves Case," 1866, pages 331, 332:

"Mr. Smith said he felt it his duty to make some observations to the jury before they delivered their verdict.

"The Lord Chief Justice: If you wish to take up any more of their time, you have a right to do so.

"Mr. Smith's Address

"Mr. Smith accordingly addressed the jury, and said he believed on his word and honour as a gentleman that the documents which the petitioner had produced—

"The Lord Chief Justice: I insist on your not finishing that sentence. It is a violation of a fundamental rule of conduct, which every advocate ought to observe, to give the jury your personal opinion."

Counsel may equivocate as much as he wishes, the ugly fact cannot be gainsaid that he stated the amount "I think is appropriate for Mrs. Kulikowski" (R.T. 296) "these are guidelines" (R.T. 297) "* * * as regards the $91,350.00 verdict, that I think it is fair and equitable" (R.T. 298) "* * * Mr. Perry specifically accused me * * * of chicanery and legerdemain * * * for putting on the board specific sums of money that I think are fair, just, equitable and appropriate." (R.T. 327)

(At this point Mr. Perry interrupted counsel with an objection that this line of argument was not proper rebuttal. "The Court: I think he may proceed." (R.T. 327)

At this point counsel for appellant chided Mr. Perry for not expressing his personal opinion as to what the verdict should be. (Op. Br. 8, 9) advising the jury that, indeed, this was the obligation of counsel in a personal injury case "bound by the rules of evidence, the ethics of the profession, and as an officer, a servant of the jury * * * to give the jury his best estimate, some guidelines, some thought, as to what is appropriate, what is fair as a verdict." (R.T. 327, 328)

And there is no escape from the conclusion that the jury accepted Mr. Rosengren's factual statement; that, indeed, counsel had the right to tell the jury what their verdict should be and that Mr. Perry had defaulted in that respect for the verdict of the jury was Mr. Rosengren's unsworn opinion—to the penny.

THE RES JUDICATA ARGUMENT

The case of *Di Orio v. City of Scottsdale,* 2 Ariz. App. 329, 408 P.2d 849 is not even remotely in point. It involved judicial action—not a compromise settlement.

THE ALLOWANCE OF EXCESSIVE DAMAGES

Appellee misstates the evidence as to the condition of Mrs. Kulikowski's injured ankle. Appellee asserts:

> "The only way to relieve Mrs. Kulikowski's pain is the impractical solution of keeping her in bed or in a position where she does not have to work. In the event the pain becomes so progressively severe that she is no longer able to work then, and only then does Dr. Nichols plan to do the radical surgical procedure known as the fusion operation." Ans. Br. 7

The transcript reference is to page 188.

Since the point is significant we reproduce here for the convenience of Court and counsel Dr. Nichols' actual testimony, pages 187, 188, 189, 190 (emphasis supplied).

> "Q. Doctor, did you experiment with different kinds and classes of shoes that might facilitate her walking or—
>
> A. I am not sure that I would say 'experiment,' but we—
>
> Q. Oh, I am sorry to use a crude term like that. Forgive me.

A. We used—well, we had a problem inasmuch as her ankle joint had limitation of motion. There was a swelling of the joint, which is associated with her injury, and there was pain when Mrs. Kulikowski did ambulate, so that we did use different appliances in an attempt to afford her more support and alleviate her pain, such as arch supports and different type of shoes and things of that nature.

Q. Yes. She complains of constant pain, doctor. Is that consistent with this type of injury?

A. Well, I think it is inasmuch as by examination and x-rays Mrs. Kulikowski has developed a significant arthritic condition of her left ankle.

Q. Have you given some thought or consideration, or is there something you can do to alleviate that?

A. Well, we have done—the first step, of course, is to limit Mrs. Kulikowski's use of her ankle. I mean if she weren't walking or, I mean, *if she didn't have to walk,* which, of course, she does, *she probably wouldn't have significant discomfort.* So along those lines I have recommended and Mrs. Kulikowski intermittently does use a cane when her ankle bothers her.

I have mentioned to Mrs. Kulikowski and have entertained the thought if this particular problem progresses and if this pain of her ankle becomes such that she is no longer able to ambulate because of this discomfort an ankle fusion might well be indicated.

The pain of the joint and, in this case, an ankle, is related to motion of the joint. If we were to stop the motion of this joint, we would greatly diminish the pain.

Q. Yes.

Now, do I understand correctly, then, that if you were to fuse her ankle, you could eliminate the pain, but she would have a stiff ankle? Would that be without flection or motion?

A. She would have no motion of the ankle at all; and, *therefore, there would be no pain of the ankle.*

However, it's not quite that cut and dried inasmuch as she would have motion of the remaining joints of her foot, *so that she would most likely walk quite well.* By the same token, she would most likely also have some discomfort of the foot because the joints that were then being used would be used more than they normally would because they are taking up the motion of the ankle joint that has been fused.

So I don't think that any fusion procedure is sort of a hundred percent. I mean this is why we think about a fusion rather than doing it routinely because we are not going to return that person to a normal state.

Q. I take it, then, that this condition you have described about her ankle, at least, is a permanent condition?

A. Yes, it is.

Q. Doctor, we have the medical bills in evidence, and there is no need to dwell on those. I did want to ask you, though, if it comes to pass in the future that you do a fusion, can you give us a rough estimate of the cost of such an operation and hospital expenses entailed?

A. Well, the patient, Mrs. Kulikowski, I am sure, would be hospitalized for two or three weeks, and I don't know that I could estimate the cost of hospitalization at that time. Certainly, it would be more than it is now, and now it's probably $40 a day.

I would think that the surgical fee would be somewhere in the nature of $350, the anesthetic fee perhaps 60 to 70, I don't know, something of that nature."

The above expert medical testimony—the only testimony on this point in the record, given by plaintiff's own expert, demonstrates:

1. Mrs. Kulikowski now has pain in her ankle only when she walks.

2. The fusion operation would eliminate the pain in the ankle, and she would walk quite well but not normally.

Counsel for appellee in his argument testimony to the jury (R.T. 294) said:

> "Now, then, you heard Dr. Nichols testify this morning, and you will recall his testimony as well as I. Essentially he said something like two weeks plus in the hospital, the present cost, roughly $40 a day, $350 for the surgeon's fee, essentially about a thousand dollars. You can figure it up to check on me to see if it isn't roughly about a thousand. (Writing on board.)"

And the jury awarded Mrs. Kulikowski the cost of the fusion operation for the verdict equalled exactly the total of the itemization of damages as written by counsel on the board.

Appellee then misses (or ignores) the thrust of appellant's argument, for the problem is treated as a simple excessive verdict issue and refuge sought in the familiar rule that a court and jury is best able to value injury, pain and suffering.

This is not a case of an outrageous verdict—*this is a case wherein the jury has awarded a plaintiff the entire cost of a surgical procedure which will substantially eliminate all pain in her ankle and has, at the same time awarded this plaintiff $50,000 as damages for future pain and suffering as if the surgical procedure was not contemplated and paid for.*

Counsel further testified as to his opinion in his opening argument as follows: (R.T. 296, 297)

> "Now, what is it worth to have pain like that? You are going to decide. I am suggesting to you that for the first two years, when she really had it rough, that $7,500 a year is not inappropriate. You will decide. (Writing on the board.)

"All right. That would be $15,000. But now this is an old accident, so easy to sweep these past tragedies under the rug and forget about them. It's going on five years. So there has been three other years that we really have to bring this up to date, *and I am suggesting that that pain at the sum* of $2,000 a year. (Writing on board.)

"Now, that brings us up to date.

"By the way, we have in evidence a medical evaluation of pain. There is the anesthesiologist's bill in here, I believe it is Dr. Zemer, $35, to spare one in pain when one is in surgery for that hour or thereabouts. That's an indication. Doesn't he spare you with pain or from pain when they are performing an operation on you?

"All of these are merely guidelines. You will decide from your own deliberations.

"And now His Honor will say and direct and give you a mandate that you must consider future pain, future discomfort, and it is your solemn obligation to consider that.

"Now, how long does that go on? Well, you heard the testimony. She is always going to have a state of discomfort, whether she has the ankle fused and loses the mobility of that ankle or not, and his Honor is going to tell you that her life expectation is 25 years; and, therefore, it is your job as people wearing black robes, jurors, judges of the facts, to determine what is fair for future pain and future discomfort.

"I am suggesting the sum of $2,000 a year for her life expectation. (Writing on board.)

"All right. Future pain, *$2,000* a year, 25 years, that's $50,000." (Emphasis added)

Plainly the $2,000 per year "guideline" for the jury in appellee's then condition was the same "guideline" employed by counsel for future pain and suffering or the same $2,000 per year over 25 years' asserted life expectancy.

This is plainly not an excessive verdict—this is a verdict awarding damages for claimed pain and suffering which is to be substantially eliminated by an operation also paid for by appellant.

EARNING CAPACITY

Again appellee misses (or ignores) the thrust of appellant's argument. Mrs. Kulikowski was injured January 19, 1963. She returned to work in September, 1963. She had worked steadily, at the same salary she received prior to the accident to the date of trial November 2, 1967, and she was continuing to receive the salary she had earned and there was no evidence or indication that this would change. Counsel stated to the jury, despite this record, that for the ensuing 12 years, i.e., from her then age of 53 years to age 65 when she would retire that the "guideline" for the jury was the assumption that Mrs. Kulikowski would suffer an earning loss of $2,000 per year which included the year 1967 —when she had not suffered any earning loss and was completely contrary to all the evidence which indicated she would suffer no loss of earnings.

If the precise measure of the loss had not been specified by counsel in his "guidelines" which were plainly overreaching and contrary to the record and if this plainly spurious claim, as made by counsel, had not been blindly accepted by the jury appellant would not have the feeling of outrage at counsel's testimony which spurs this appeal for relief. It accentuates and clearly demonstrates that the jury paid no attention to the court's instruction that the jury was to independently value the evidence and not accept counsel's argument as a "guideline." It nails down the conclusion that by willful disregard of Canon 15, Canons of Professional Ethics, appellee has gained a verdict for damages plainly

not justified by appellee's own evidence. We respectfully suggest that a federal court should not tolerate or condone such conduct or permit the fruits thereof to be enjoyed by the beneficiary thereof.

THE JURY "GUIDELINES" ISSUE

Appellant tried to make it plain in her Opening Brief that this appeal does not involve the *Botta v. Brunner* controversy. Perhaps, in the hope of directing the attention of the Court away from the sensitive area of a verdict plainly bottomed upon the unsworn opinion testimony of counsel for appellee, appellee would like to lead the Court into resolving this appeal as if that problem was decisive here.

Appellant refuses to be turned aside from the true fundamental error here complained of—a miscarriage of justice brought about by the repeated statement by counsel for appellee as to what amount of damages would be fair, equitable and appropriate in his opinion—and by his bold assertion to the jury that in so doing he was bound by the rules of evidence and his professional ethics. And then, as if this was not enough, by his bold assertion that this was what a lawyer was supposed to do—and by his criticism of counsel for appellant for failing to follow his lead.

Counsel knows, as does the Court, how delicate the balance is as between jury acceptance and rejection of interruptions of counsel in argument—how easily a jury may be swayed by disapproval of interruptions since the jury fails to realize the reason therefor or the purpose thereof. Court and counsel also know that once a statement is made to a jury cautionary instructions are of little value.

Appellant's counsel did object to appellee's argument during the course of the argument and at its conclusion. Appel-

lant, contrary to the assertion of appellee, did move for a mistrial.

> "If the court please, at this time the cross-defendants, cross-claimant Williams, moves for a mistrial based upon the misconduct of counsel during final argument.
>
> "I will not attempt to enumerate pending a copy of the transcript all of the many areas wherein counsel went beyond the bounds of propriety in his argument, but I feel that the argument was so filled with error that there is practically no hope of justice being done to my client by this jury."

The Court said:

> "Do you care to respond at this time?"

Mr. Rosengren said:

> "No."

The Court said:

> "Very well. The motion is denied *at this time with leave to renew it later should circumstances warrant and the record justify.*" (R.T. 340) (Emphasis added)

In appellant's Motion for a New Trial counsel stated:

> "This Motion for a New Trial is the only means available to Petra Williams to renew the motion for mistrial made at the conclusion of final arguments. We submit that the circumstances warrant the renewal of the motion and that the record justifies its being granted."

In Appellant's Motion for a New Trial (T.R. 29-39; 101-103) each of the grounds for reversal urged here were urged to the trial court. The Reply Memorandum of Appellant (T.R. 103) concludes:

> "The motion for a mistrial made at the conclusion of the final argument and renewed at this time pursuant

to the express authority of the court should be granted and a new trial ordered."

The argument that since the trial court gave certain stock cautionary instructions generally to the effect that the jury was the sole judge of the evidence and that counsel's argument was not to be accepted as evidence would weigh more heavily but for two plain facts:

1. The jury patently either did not remember or else disregarded this instruction; or

2. Accepted counsel's statements as a value opinion but not as argument or comment.

Reasonably the jury may have looked upon counsel's opinion as to the appropriate measure of damages as not argument or comment but as an informed opinion entitled to great weight because of counsel's experience as a personal injury lawyer.

And it is not to be overlooked that the Court also told the jury: (R.T. 342)

> "*Arguments* and *comments* of counsel *are intended to help you in understanding the evidence and applying the law.* While *arguments* are not evidence, counsel may argue reasonable inferences from the evidence. If any *comment* of *counsel* has *no basis in the evidence* as you find it, you are to disregard that comment. If there has been a stipulation or an agreement as to any fact by counsel, you may consider the stipulated fact as evidence." (Emphasis added)

And also immediately prior to Mr. Rosengren's opening argument: (R.T. 290, 291)

> "I would remind you, as I have said earlier, that statements of counsel are not evidence. The facts in this case are as you determine them to be; and regardless of what counsel may inadvertently say, and if you

feel that the facts are different than counsel may represent the facts to be or have been, it's, of course your determination that counts.

"However, I would advise you that arguments of counsel can be most helpful to you in organizing your own thoughts, in recalling the evidence over the last two days, *and in helping you evaluate and arrive at a determination of the case.*

"So for that reason *I urge you,* please, *pay close attention to the arguments of counsel. They can be very helpful to you.*"

It seems a reasonable conclusion that the jury may very well have misunderstood the Court's instructions and innocently accepted counsel's *opinion* evidence as being *neither fact* nor *comment,* particularly because of counsel's assertion that it was part of counsel's obligation, "bound by the laws of evidence and the ethics of the profession" to evaluate the injuries of the plaintiff and give his *opinion* as to the amount the verdict should be as "a servant of the jury."

Be that as it may, either innocently or inadvertently or capriciously, it is clear that the jury accepted counsel's opinion as governing and as a reliable "guideline" which they followed to the penny.

Appellant stated in her Opening Brief and now repeats as putting the position of appellant in clear perspective:

Had appellee called an experienced personal injury lawyer, specializing in plaintiff's cases as a witness and asked such witness, *under oath,* as to his opinion as to the amount of damages which would be "appropriate" as a verdict the offer would be rejected by the Court out of hand.

Is the error any less egregious because the witness was unsworn?

The Arizona Supreme Court in *Sisk v. Ball,* 91 Ariz. 239, 371 P.2d 594, 598 said:

> "It is well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving the issues before them solely by an appeal to passion and prejudice are improper and will not be countenanced. * * * *a verdict obtained by incorrect statements or unfair argument* or by an appeal to passion or prejudice *stands on but little higher ground than one obtained by false testimony.*" (Emphasis added)

CONCLUSION

Appellant respectfully asserts that she has not had a fair trial and that, accordingly, she "should have another one."

Respectfully submitted,

SNELL & WILMER
By MARK WILMER
400 Security Building
Phoenix, Arizona 85004
Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARK WILMER
Attorney